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DATE: October 20, 1995
CASE NO. 94-ERA-32

IN THE MATTER OF

CHARLES J. BOYTIN,

COMPLAINANT,

v.

PENNSYLVANIA POWER AND LIGHT COMPANY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER OF REMAND

This proceeding arises under the whistleblower provision of the Energy Reorganization Act of 1974, as amended (ERA or Act), 42 U.S.C. § 5851 (1988 & Supp. V 1993). Before me for review is the Recommended Decision and Order (R. D. and O.) issued by the Administrative Law Judge (ALJ) on March 14, 1995.

Complainant Boytin raised allegations in his complaint that he was subjected to adverse and retaliatory action as a consequence of his speaking to Nuclear Regulatory Commission (NRC) staff regarding alleged security violations occurring at Respondent Pennsylvania Power and Light Company's (PP&L) Susquehanna nuclear power plant. Boytin is employed as a Senior Security Officer at the Susquehanna facility.

The ALJ recommends dismissal of the complaint for Boytin's putative failure to make a *prima facie* showing of discrimination. The ALJ determined that PP&L did not engage in retaliatory action against Boytin. R. D. and O. at 13. After reviewing the entire record, including the hearing transcript, the exhibits and the briefs filed by the parties, I disagree with the ALJ's

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determination and find that Boytin has sustained his burden of proof with regard to the discriminatory nature of the Respondent's actions toward him. I therefore remand the case to the ALJ for a determination of the appropriate relief to which Boytin is entitled consistent with the opinion below.

BACKGROUND

The ALJ carefully reviewed the record and I concur in his

presentation of the relevant facts in this case. R. D. and O. at 1-8. Briefly stated, Boytin was hired as a Security Officer by PP&L in 1982 and was promoted to a supervisory position of Senior Security Officer in 1984. Company policy provides for each employee to undergo a Performance Appraisal each year. In the rating years from 1984 through 1988, Boytin was appraised in the Fully Competent or Good category.[1] Claimant's Exhibits (CX) 6-10. In rating years 1989 through 1991, he was appraised in the Exceeds Standards or Very Good category. CX 3-5. In January 1992, Darryl Zdanavage became Boytin's shift supervisor, Transcript (T.) at 456-57, although Boytin's 1991 appraisal was prepared by his supervisor for the preceding nine months. CX 3.

In March 1992, Boytin advised Zdanavage that he, Boytin, had inadvertently violated a security procedure, although he quickly remedied the situation at that time. T. at 25-26. In all probability no one would have ever known of the breach had Boytin not reported it to Zdanavage. T. at 520. Although Zdanavage cited Boytin's security lapse in a memo, he also praised Boytin for his honesty and said that turning oneself in was "admirable and indicative of your character." CX 13.

There was an apparently normal business interaction between Boytin and Zdanavage during the first nine months of 1992, at least as perceived by Boytin and two other Security Officers working in Zdanavage's shift. T. at 21-22 (Boytin); 104 (Oswald); 116 (Houseknecht). In September 1992, Boytin contacted the NRC site representative to report what he believed were serious breaches in security protocol by Zdanavage and the Assistant Shift Supervisor, Ronald Kishbaugh. T. at 28-32. Shortly after Boytin's action became known within the security force, there was a marked change in Zdanavage's and Kishbaugh's attitudes and working relationships toward Boytin. T. at 38-41; 104; 116; 363-64 (Kishbaugh); *but see* 463-64 (Zdanavage).

Zdanavage's annual appraisals of Boytin's general performance in March 1993, and March 1994, placed him in the Good category, which was a level drop from Boytin's three previous annual appraisals. Although the general ratings Boytin received after engaging in protected activity were the same ratings Zdanavage gave the other two Senior Security Officers, Boytin's fractional ratings, or the ratings of specific employment elements upon which the overall rating was based, were

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significantly lower than those given to the other Senior Security Officers. CX 1, 2 (Respondent's Exhibits [RX] 56, 57); RX 27, 28.[2] Boytin challenged the lowered performance ratings, but they were upheld at each higher level of administrative review.

Boytin filed a complaint with Department of Labor Wage and Hour Division on June 13, 1994. Subsequent to a factfinding investigation, the Department of Labor found that Boytin was a protected employee, engaged in a protected activity and that discrimination was a factor in the actions about which he had complained.[3] Respondent appealed the Wage and Hour determination, and a hearing was held on October 27 and 28, 1994.

DISCUSSION

The employee protection provision of the ERA, 42 U.S.C. § 5851(a), makes it unlawful for an employer to retaliate

against an employee for activities pertaining to alleged violations of the Act. The Secretary has set forth the burdens of persuasion and production in whistleblower proceedings, requiring the complainant to first present a *prima facie* case. To do this, a complainant must show: (1) that the complainant engaged in protected activity; (2) that the employer was aware of that activity; and (3) that the employer took some adverse action against the complainant. *Carroll v. Bechtel Power Corp.*, 91-ERA-46, Sec. Dec. and Order, Feb. 15, 1995, slip op. at 8-12, *pet. for review docketed*, No. 95-1729 (8th Cir. Mar. 27, 1995).

The ALJ found that: (1) Boytin engaged in protected activity by his initial report to the NRC and subsequent cooperation with the investigation of his allegations; and (2) PP&L had actual knowledge of Boytin's protected activity. R. D. and O. at 8-10. I agree. The record fully substantiates these findings.

The ALJ confused the distinction between making a *prima facie* case and carrying the ultimate burden of proof. The ALJ stated that "[C]omplainant failed to establish that his 1992 and 1993 appraisals constituted an adverse action. R. D. and O. at 12. But, the ALJ went on to conclude that "[t]herefore, [C]omplainant has failed to prove one of the elements of his *prima facie* case" *Id.* As I have noted in several decisions, see e.g. *Carroll*, slip op. at 8-12, once a case has been fully tried on the merits, the answer to the question whether the complainant presented a *prima facie* case is no longer particularly useful. In this situation, although the ALJ couched the determination in terms of a *prima facie* case, it appears that the entire record was evaluated in reaching the conclusion that Boytin failed to prove an adverse action. However, I disagree with the ALJ's conclusion.

The ALJ has too narrowly defined the adverse action element of a retaliation case. The ALJ focusses on the fact that

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Boytin's general rating was in the Good range and as such, determined that Boytin was not harmed with regard to his career or salary and the appraisal "did not affect the terms of his employment in any manner." R. D. and O. at 10. I do not agree with the ALJ's assessment of the effects of the appraisals, nor do I concur that the animus incurred by Boytin was contained solely in the resultant appraisals.

Testimony by Richard L. Stotler, the manager of nuclear security at PP&L's Susquehanna plant, substantiates Boytin's allegation that his lower fractional ratings resulted in a nominally lower salary increase relative to the other Senior Security Officers. Although the total difference in dollars, as calculated by Stotler, of \$609.26, is not substantial, it is indicative of Boytin's material loss. T. at 191-97; RX 12, 62. Stotler further testified that the company was in a very tight financial situation, T. at 189-90, and that an employee's comparative fractional ratings could have a bearing on his job retention if the company was faced with a reduction in force due to deteriorating financial conditions. T. at 219-20.

The most drastic result of Boytin's allegations of security

improprieties to the NRC, however, was the degree of animus they generated and how his life on the job changed for the worse. Boytin's contentions of these adverse changes were substantiated by his fellow workers, Oswald, T. at 103-04; and Houseknecht, T. at 116-17. Even Kishbaugh, the Assistant Shift Supervisor implicated in Boytin's allegations, admitted to the change in how he related to Boytin after the NRC investigation. T. at 346-47.

Normal every day contact with the supervisors was all but shut down. Prior to the NRC investigation, either or both supervisors would spend approximately an hour on a post check during each half of the twelve hour shift, or approximately two hours each work day, with Boytin. They would chat with him, passing the time of day, while he was at his work station monitoring the activities of the Security Officers on field duty in the facility. T. at 21-22. After Boytin's protected activity the post checks changed to 15 to 20 stress-filled minutes by either or both supervisors. The supervisors would stand silently behind Boytin, staring at him, not saying anything until they left, telling him to log them in for a post check. *Id.* at 94. Not surprisingly, Boytin's reactions to the stress of this hostile work situation were a variety of physical ailments requiring him to take additional sick leave.[4] *Id.* The additional sick leave was subsequently determined by Zdanavage to be a negative factor in his evaluation of Boytin's dependability. The result was an adverse impact on Boytin's general performance appraisal. CX 1, 2.

The animus toward Boytin appears to be pervasive throughout

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the security organization. Roland Ferentz, the Security Operations Supervisor, testified that although he had approved Boytin's 1990 and 1991 Very Good general appraisals, T. at 324-25, he did not consider Boytin's drop in ratings to the worst rated Senior Security Officer in 1992 and 1993, either "harsh" or "drastic." T. at 334.

John Paciotti, a security shift supervisor who had been Boytin's assistant shift supervisor, began to find fault with Boytin's work in 1993, T. at 394, even though he had previously rated or concurred in Boytin's Very Good ratings on the 1989 and 1990 Performance Appraisals. CX 4 and 5. Security Manager Stotler testified that: "I considered . . . [moving Boytin to a different shift] and decided against it for a couple of reasons. First of all, I'm sure officer Boytin *considered whatever repercussions may happen by taking the road he took. So, that was his decision to do that.*" (Emphasis supplied). T. at 241. The decision not to move Boytin was apparently in concert with the suggestion of Robert Gombos, PP&L's vice-president for human resources, who thought, Stotler testified, it would be best for Boytin and Zdanavage to resolve the issues, "to get together, talk, come up with a plan of what they're going to do to improve their relationships and this and that and that and this." *Id.* at 178.

Zdanavage's supervisory style can be fairly characterized as idiosyncratic. Zdanavage stressed his concern for teamwork and harmony to the members of his shift. T. at 388. Nevertheless, he criticized Boytin for not volunteering for more routine overtime, at times when apparently enough shift members

were already volunteering for the additional pay. He also criticized Boytin for volunteering to work overtime during the Christmas holiday period, when most security personnel were reluctant to work overtime. CX 1 at 8; CX 2 at 12; T. at 467, 476.

Zdanavage testified that he, as a supervisor, had never given a subordinate employee an overall Very Good or Exceeds Expectations rating. T. at 477. Zdanavage's ratings of the specific elements of the 1992 Performance Appraisals of the three Senior Security Officers on his shift, Boytin, Drury and Urban, range from Very Good to Marginal. It is striking that Zdanavage's numeric rating of Boytin is consistently less favorable than that of either Drury or Urban, even when the descriptive language used is almost identical word for word.[5] Furthermore, although Zdanavage commented on Boytin's overall performance as being above his peers, he ranked Boytin last among the three Senior Security Officers in nine out of fourteen appraisal elements. RX 56.

The underlying purpose of the whistleblower provision of the ERA is to protect employees who become aware of, and report,

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violations of the Act by their employers. The scope of the Act must therefore be broadly construed to prevent the intimidation of workers through retaliation. *DeFord v. Sec'y of Labor*, 700 F.2d 281, 286 (6th Cir. 1983). This breadth of construction includes the form that the discriminatory actions against the employee may take and goes beyond a measurable dollar loss, although that criterion is in fact met in this case. See *Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992) (emotional distress provides basis for compensatory damages); *Airtrip v. Ebasco Services, Inc.*, 89-ERA-23, Sec. Dec. and Order of Remand, Mar. 21, 1995, slip op. at 6-7 (adverse action need not be monetary loss); *Bassett v. Niagara Mohawk Power Corp.*, 85-ERA-34, Sec. Final Dec. and Order, Sept. 28, 1993, slip op. at 4; [6] see *DeFord v. T.V.A.*, 81-ERA-1, Sec. Order on Remand, Apr. 30 1984, slip op. at 3-4 (mental pain and suffering are compensable).

Boytin's testimony that the adverse working conditions occurred shortly after it became known that it was he who had gone to the NRC site representative is corroborated by Security Officers Oswald and Houseknecht. The temporal proximity of the changed working conditions to Boytin's protected actions is sufficient to establish an inference of causation. *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989). The temporal inference in conjunction with the discriminatory performance ratings, as set out above, show that Boytin carried his burden to prove that his protected activity caused the adverse action.

Therefore, I determine that Boytin has proven by a preponderance of evidence that an adverse action was taken by PP&L against him and that it was motivated by Boytin's protected activity. I do not determine that Boytin has made a persuasive case that he would have been entitled to an overall rating of Very Good (2), and is therefore entitled to be in the higher salary group. Boytin's Performance Appraisal ratings should be changed to reflect his actual job performance and his back pay should be recalculated to meet the higher of the other

two Senior Security Officers. Boytin should also be entitled to take advantage of any of the company's other compensable benefits including its stock option and savings plans that may have been adversely affected by PP&L's discriminatory conduct. T. at 192.

In addition, I am satisfied that given the hostile working conditions and the degree of animus at the Susquehanna facility, that Boytin's request for a transfer to another PP&L facility within a 30 mile radius of his home, with equivalent pay and supervisory group responsibilities, is reasonable and should be accommodated by the company, if possible. On remand, the ALJ shall consider what other relief may be appropriate, including front pay,[7] if such a transfer is not possible.

Finally, Boytin should be awarded reasonable attorney's fees

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and costs. 42 U.S.C. § 5851(b)(2)(B); *DeFord*, 700 F.2d at 288-89.

Accordingly, this case is remanded to the ALJ for a Recommended Decision on the amount of appropriate damages, including back pay and benefits, attorney's fees and costs, consistent with this decision.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The company modified its appraisal forms, descriptive terminology and its numeric rating system during the periods in question. This decision will use terminology consistent with the actual ratings rather than the terminology then in use. The rating periods overlapped the calendar year, starting in March. Each rating period was designated by the year the period began, so rating year 1993 would encompass from March 1993 to March 1994.

[2] The record contains the 1992 performance appraisals for the other two Senior Security Officers, and conforming testimony from Richard L. Stotler, PP&L's Manager of Nuclear Security at the Susquehanna plant. T. at 248. The record does not contain RX 31 and 32, which are the 1993 performance appraisals for the two other Senior Security Officers, but I take notice of the fractional ratings these officers received as cited in Complainant's brief before the Secretary at 11, and not disputed by Respondent in its reply brief. There is no explanation why these appraisals were not introduced into evidence at the hearing.

[3] Letter dated July 13, 1994 to H.G. Stanley, VP Nuclear Operations, PP&L, from Michael J, Corcoran, District Director.

[4] It is not necessary to analyze this as a hostile work environment case since the actions of the Respondent caused tangible job detriment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986).

[5] The following excerpts are from each of the Senior Security Officers' 1992 Performance Appraisals. It should be noted that the lower the rating number the better the rating.

John Drury - Accomplishment 1 "Through out the evaluated period, John has performed with qualities indicative of a fully competent Sr. Security Officer. He has the ability to accurately assess situations, and possesses the skills to effectively control the actions of the Security Force during day to day activities. Performance Level: 2.8"

Frank Urban - Accomplishment 1 "Frank has demonstrated all the qualities of a fully competent Sr. Security Officer. He makes quick and accurate assessments and can effectively deploy Security Force members to adequately neutralize a situation. Performance Level: 2.8"

Charles Boytin - Accomplishment 1 "Throughout the evaluated period, Chuck has demonstrated the qualities indicative of a fully competent Sr. Security Officer. He makes quick and accurate assessments and displays the effectiveness to deploy Security Force members to neutralize a given situation. Performance Level: 3.0"

John Drury - Accomplishment 5 "John is extremely knowledgeable of the personal computers that are utilized to complete a multitude of security related documents. When these documents are submitted for supervisory review, they are complete accurate and generally error free. Performance Level: 2.5"

Frank Urban - Accomplishment 5 "Frank understands computer applications. He effectively makes use of computer equipment and facilities to document and compile reports relevant to Security. Frank's work is extremely neat and is generally error free. Performance Level: 2.8"

Charles Boytin - Accomplishment 5 "Chuck possesses a competent knowledge of computer fundamentals and makes effective use of available equipment. He insures all activities of the shift are chronologically annotated. In most cases, Chuck's submitted paper work is error free. Performance Level: 3.0"

[6] I disagree with the ALJ's distinguishing the *Bassett* decision from this case. In *Bassett* the complaint was denied because the Complainant failed to show temporal proximity to the adverse action and the Respondent was able to present an un rebutted nondiscriminatory reason for the adverse action. The Secretary did find, however, that negative comments in a performance evaluation constituted an adverse employment action.

[7] The Secretary has not yet ruled on the appropriateness of an award of front pay in whistleblower cases where reinstatement does not appear to be in a complainant's best interest. The issue is, however, squarely before the Secretary in the case of *Creekmore v. ABB Power Systems Energy Services, Inc.*, 93-

ERA-24, in which an ALJ recommended front pay damages.